Supreme Court of the United States.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of DANIEL LEROY DRESSER and CHARLES E. RIESS, as members of the firm of Dresser & Co.,

Appellant,

AGAINST

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, THE SECURITY WAREHOUSING CO. and UNITED STATES MORTGAGE AND TRUST CO.,

Appellees.

BRIEF AND ARGUMENT FOR THE APPELLEES WENMAN, FISH AND BOLDT, ON APPEAL FROM DECREE SUSTAINING DEMURRERS AND DISMISSING BILL FOR WANT OF JURISDICTION.

Statement.

These appellees do not concede the correctness of the statement prefixed to the appellant's brief, and

particularly do not concede that the epithets characterizing various matters set forth in the bill are correct characterizations of those matters or are admitted by the demurrers to be such. Neither do the appellees concede that the numerous inferences and conclusions of law which are woven into the text of the bill are admitted by the demurrers.

1 Daniell's Chancery Pleading and Practice (6th Ed.), *p. 545 and notes.

The material facts alleged in the bill and which appear to these appellees to be admitted by the demurrers are as follows:

That the complainant was appointed, qualified and is acting as trustee in bankruptcy of Dresser and Riess, individually, and as members of the firm of Dresser & Co. (Record, p. 2, par. 1); that at the times mentioned in the bill and up to March 7, 1903, said Dresser and Riess were carrying on business as merchants under the name of Dresser & Co., at Nos. 15 and 17 Greene street, in the City of New York (*Ib.*); that for at least six months prior to March 7, 1903, Dresser & Co. were insolvent, and on that day they assigned all their property to Charles S. Mackenzie for the benefit of their creditors (pp. 2, 3, pars. 5, 6), that on March 9, 1903, Robert C. Morris and Charles S. Mackenzie were appointed receivers in bankruptcy of Dresser & Co., and of Dresser and Riess individually (pp. 2, 3, par. 5); that the goods dealt in by Dresser & Co. consisted for the most part of Japanese silk (p. 3, par. 6); that Dresser & Co. entered into an arrangement with the defendant The Security Warehousing Co. by which Dresser & Co. made a lease of their store, display and salesroom in the City of New York to the Security Warehousing Co. at a rental of one dollar per year (p. 3, par. 7); that there was no change of location of the goods, but Dresser & Co. sold and disposed of them, exhibiting the same to their

customers and sending such portions as they desired to the dyers and manipulators (p. 3, par. 8); that the Security Warehousing Co. exercised no supervision or control over the goods but employed one Gertrude B. Fish, the confidential clerk of Dresser & Co., as its custodian, in whose charge it was claimed the goods had been placed, paying or contracting to pay her a salary of one dollar a month (p. 3, par. 9); that she exercised no control or supervision over the goods and continued to act as the confidential clerk of Dresser & Co. (p. 3, par. 8); that the Security Warehousing Co. also placed tags on certain of the shelves, bins and counters on which the goods were stored and displayed for sale, upon which tags the name of the Security Warehousing Co. was printed, but the tags were not easily discernible (p. 3, par. 9); that the Security Warehousing Co. prepared certain instruments in writing (in the bill called Security Instruments) in the general form of warehouse receipts, purporting to be warehouse receipts and representing that certain goods had been stored with it at its warehouse 15–17 Greene street in the City of New York (which was the store of Dresser & Co.) (p. 4, par. 10); that the Security Instruments merely stated that goods of a certain quality, value and amount had been stored (p. 4, par 11); that these Security Instruments were delivered to Dresser & Co. and some were, in turn, delivered to the Security Warehousing Co., some to the U. S. Mortgage and Trust Co., some to the defendant Wenman for himself or for the defendants Fish and Boldt, and some to other parties, to secure loans made to Dresser & Co. (p. 4, par. 12); that all the Security Instruments outstanding on March 9, 1903, were held by the defendants (p. 4, par. 13); that Daniel LeRoy Dresser was one of the incorporators of the defendant The Security Warehousing Co. and from the time of its organization until after March 7, 1903, he was one of its directors and stockholders (p. 4, par. 14); that at the times of the delivery of the Security Instruments

Charles S. Mackenzie had been for some time and during all the times mentioned in the bill he continued to be the general counsel of the Security Warehousing Co., and was fully cognizant of the details of its business and of its system of storage hereinbefore described, and he was also the personal counsel and confidential representative of Daniel LeRoy Dresser (p. 4, par. 15); that, after the delivery of the Security Instruments to the defendants, Dresser & Co. continued to display for sale and to sell and dispose of the goods and to send the same to be dyed and otherwise manipulated, to all of which neither the Security Warehousing Co. nor any of the defendants made any objections, nor did they make any effort to prevent the sale and disposition of the goods and the management and control thereof by Dresser & Co. (pp. 4, 5, par. 16); that when the Receivers Morris and Mackenzie went into possession of the store, display and salesroom of Dresser & Co. on the 9th day of March, 1903, upwards of $150,000 worth of goods were there; that afterthe Receivers had taken possession of the store, the defendant The Security Warehousing Co. notified them that it claimed that the store, sales and display room belonged to it under the lease, and that the goods therein contained had been stored with it by the firm of Dresser & Co., and it demanded the delivery of all the goods (p. 5, par. 18); that the Receivers did not dispute this claim of the Security Warehousing Co., but acquiesced therein and complied therewith (p. 5, par. 19); that neither the Court nor the unsecured creditors of Dresser & Co. were advised of the facts concerning this claim (p. 5, par. 20); that thereafter the Security Warehousing Co. and the Receivers, Morris and Mackenzie entered into certain agreements under which some of the goods were sold by the latter as the agents of that company and the proceeds thereof paid over by them to it, without notice to the other creditors of the firm of Dresser & Co. and without any memoranda, account

or statement of what moneys were received from the sale of the goods claimed to be represented by any one of the Security Instruments, that the balance of the said goods were sold by the Security Warehousing Co. through other agents and without notice to the other creditors of Dresser & Co. (p. 5, par. 21); that the Security Warehousing Co. claimed to Morris and Mackenzie that certain of the goods so claimed to have been stored with it and represented by the Security Instruments had been sold by Dresser & Co. prior to the 7th day of March, 1903; that the amount so claimed to have been sold is unknown to the plaintiff, but he has been informed by Morris and Mackenzie, and he charges it to be true, that it exceeded in value the sum of $22,000, and that thereafter and subsequent to the 9th day of March, 1903, they collected certain accounts receivable of the firm of Dresser & Co. of upwards of $20,000 and paid over the same to the defendant, The Security Warehousing Co., without notice to the other creditors of Dresser & Co. (pp. 5, 6, par. 22); that all of these silk goods were sold and all of these accounts receivable were collected by the Security Warehousing Co. prior to the appointment of the complainant as trustee in bankruptcy of Dresser & Co. and none of the goods or their proceeds or of the accounts receivable have come into his possession except the sum of $1,944.93 paid to the complainant by the Security Warehousing Co. (p. 6, par. 23); that a large part of the proceeds of the goods sold and paid over to it and of the accounts receivable collected and paid over to it by Morris and Mackenzie and of the goods sold by it through other agents were in turn paid over by the Security Warehousing Co. to the other defendants as the holders of said Security Instruments and the balance of said proceeds were either retained by the Security Warehousing Co. or disbursed by it (p. 6, par. 24); that the books and records of the Security Warehousing Co., containing all of the entries and information concerning the sale and the disposition of said goods and the pro-

ceeds thereof and of the said accounts receivable, have all been lost or destroyed and no copies thereof are in existence nor are there any books, records, memoranda or other sources from or by means of which the complainant can ascertain the facts concerning said sale and disposition (p. 6, par. 27); that the net amount realized from the sale of the silk goods was less than $125,000, while the aggregate value of said goods as stated in the Security Instruments amounted to more than $150,000; that the values placed upon the said goods in said Security Instruments represented the cost price to the firm of Dresser & Co. which cost price averaged from twenty per cent. to forty per cent. less than the market value thereof (p. 7, par. 30).

BRIEF.

The appellant claims that the jurisdiction of the District Court, to entertain this suit, should have been sustained on two grounds, viz.:

"1st. Because the Court had custody of the silk "and accounts."

"2d. Because Sec. 70e of the Bankruptcy Act, as "amended, expressly confers jurisdiction of a suit "to set aside just such transfers as are disclosed by "the bill."

See Appellant's Brief, p. 11.

These two grounds on which jurisdiction is claimed are, of course, mutually destructive of each other. Sec. 70e deals with the avoiding of transfers *made by the bankrupt*, and, of course, if the property was transferred by the bankrupt it could not come into the possession of the Court on the adjudication, and so could not be *in custodia legis*. If, on the other hand, it did come into the possession of the Court on the adjudication, it could not previously have been transferred by the bankrupt.

The appellees Wenman, Fish and Boldt submit that the jurisdiction of the District Court cannot be sustained on either of these grounds, or on any other, and in support of this contention submit the following points:

I.

The bill is not framed as an application for the exercise of the summary jurisdiction of the Court of Bankruptcy and it seeks relief wholly beyond that jurisdiction.

The District Courts in matters of bankruptcy exercise jurisdiction in two entirely distinct ways, viz.:

(1) What is known as their summary jurisdiction based on their possession of the bankrupt's property or the pendency of the proceedings, designed to protect their possession of the assets, and exercised in a summary way upon petition and order to show cause. This jurisdiction is described and its limits defined in Bardes vs. Hawarden Bank, 178 U. S., 524, 530–35.

(2) A jurisdiction specifically conferred in a limited class of cases to entertain plenary suits between a trustee in bankruptcy and other parties.

The only jurisdiction which the court of bankruptcy acquires by virtue of its possession of property of the bankrupt, is the former, the so-called summary jurisdiction, conferred by Section 2 (7) of the present act, and exercised to protect that possession.

The present case is not an application to the Court for the exercise of this summary jurisdiction under Section 2 (7), but is a plenary suit commenced by the filing of a bill and the issue of a subpœna (see Record, p. 1, p. 8 [15]).

The plaintiff has cited no case, and we confidently assert that none can be cited in which the jurisdic-

tion conferred by Section 2 (7), as limited and defined by Bardes *v.* Hawarden Bank, has been exercised through the medium of a plenary suit. To hold that it could be done would be to disregard forms of procedure entirely and would be in direct conflict with the ruling of Bardes *v.* Hawarden Bank, that the jurisdiction conferred by Section 2 (7) is only the summary jurisdiction of the Court of Bankruptcy as such.

Nowhere in the bill can there be found a direct explicit statement that the property in question was ever in the custody of the Court or of the Receivers or that it was taken from them or yielded up by them in violation of their duty. The complainant now tries to spell out such allegations from the language of the bill, but it is obvious that he did not frame his bill on that theory. On the contrary both in his prayer for relief and also in the 29th paragraph of his bill (Record, p. 7) he distinctly suggests the possible validity of the transactions he attacks.

At page 11 of his brief, also, the appellant states, as one of his points on this appeal, that Section 70*e* confers jurisdiction of suits to set aside "*just such transfers as are disclosed by the bill*",—the transfers referred to in Section 70*e* being transfers "*by the bankrupt*" (See the section in question; also Point II., p. 18 of Appellant's Brief). If such are the transfers disclosed by the bill, whether they are voidable or not, the property did not pass into the possession of the receivers.

Further, the relief sought by this bill is not merely the relief which the Court of Bankruptcy may give in a proper case, upon proper proceedings, viz., to reclaim property taken from the possession

of the Court or held by a bailee of the bankrupt, but the bill seeks much more, to wit:

(*a.*) That the "Security Instruments" be declared invalid, fraudulent and void.

See prayer for relief (Record, p. 8).

(*b.*) That, in case any of the "Security Instruments" are decreed to be valid and the defendants entitled to hold and sell the goods and accounts, the defendants may be required to make discovery of all their acts in connection with the matter and pay over such amounts as they may be found, on accounting, to have received in excess of their claims against the goods on which they had liens.

Ibid.

(*c.*) That the defendants be required to pay dam ages for alleged improvident sales.

Ibid.

In other words, the plaintiff, in addition to an application for the return of the goods or their proceeds, which might have been framed—whether maintainable on the facts or not—under Section 2 (7) has put into his bill a suit to cancel the "Security Instruments," a suit for a discovery and accounting and a suit for damages for improvident sales, three things of which certainly the court of bankruptcy has no jurisdiction under Section 2 (7).

The fact is that the plaintiff has not ventured to rest his case on any one view of these transactions, but is trying here, as he did in a former suit in the State court, to attack the defendants on two theories at once—a course which resulted, in the State court, in his being in substance required to elect between a suit for an accounting and an action for conversion—after which decision the State court action was discontinued.

See Whitney *v.* Wenman, 96 App. Div. (N. Y.), 290.

The cases cited by the appellant do not sustain his argument as to the jurisdiction of this court over this suit.

White v. *Schloerb*, 178 U. S., 542, holds that the District Court, as a court of bankruptcy, obtains jurisdiction over property in possession of the bankrupt at the time of the filing of the petition and "has jurisdiction by summary proceedings to com-"pel the return of the property seized." We do not question this law, but it is not a ruling that the District Court has jurisdiction of a plenary suit involving not only the right of possession of property and the title to it, but also the setting aside of written instruments as void, discovery and accounting, and alleged claims for damages for improvident sales. The proceeding in the Schloerb case was a summary one, commenced by petition and order to show cause.

Mueller v. *Nugent*, 184 U. S., 1, was a proceeding instituted under the summary jurisdiction by petition and order to show cause against a bailee of the bankrupt. No question similar to the one here presented arose in that case, and there is nothing in that case to affect the ruling in Bardes *vs.* Hawarden Bank, 178 U. S., 524, that the jurisdiction conferred by Section 2 (7) was simply jurisdiction of bankruptcy proceedings as such, as distinguished from suits between party and party, and that Section 2, Subdivision (7), conferred no jurisdiction of such suits on the District Courts.

Minnesota Co. v. *St. Paul Co.*, 2 Wall., 609, was not a bankruptcy case and did not attempt to deal with the jurisdiction of courts of bankruptcy under any of the statutes. The objection to the jurisdiction in that case was taken on the ground that there was no diversity of citizenship to give jurisdiction to the Circuit Court in which the suit was brought. The decision of the Court on this branch of the case is contained in the following extract from the opinion of Mr. Justice Miller:

> "The present suit grows immediately out
> "of and is a necessity which arises from the

> " foreclosure suit and is really a continuation
> " of it.
> " The rights of the parties depend upon
> " the construction which is placed upon the
> " acts of the court in that suit; and the pres-
> " ent bill is necessary in order to have a
> " declaration of what was intended by the
> " orders and decrees made in that suit and
> " to enforce the rights which are established
> " by it."

If this were an authority for the claim that, whenever a proceeding in bankruptcy is pending, any suit by which the trustee seeks either to get possession of property, or to set aside transfers by the bankrupt, or to avoid written instruments, or to obtain a discovery or an accounting, is within the jurisdiction of the Bankruptcy Court, it would not only be at war with the ruling in Bardes *vs.* Hawarden Bank but it would mean that all the careful provisions of the Bankruptcy Act on the subject of jurisdiction are superfluous and meaningless.

The same observations apply to Morgan's Co. *vs.* Texas Central Ry. Co., 137 U. S., 171.

Sharpe *vs.* Doyle, 102 U. S., 686, involved no question of jurisdiction whatever, nor does it decide, as stated at page 15 of the appellant's brief that a receiver's act in delivering up property to a claimant is not binding on the Court and does not change the legal possession of the property.

The argument from inconvenience at pages 16 and 17 of the appellant's brief is without force. It begins by assuming everything which is claimed by appellant, but which, as above pointed out, the demurrers do not admit. Jurisdiction, of course, cannot be conferred upon a court by the fact that a litigant considers it more desirable to resort to it than to some other tribunal, and the appellant, in his supposed case, is not remediless, since the State courts are unquestionably open to him.

II.

Upon the facts as admitted by the demurrers it does not appear that the property was in custodia legis.

Unless, upon the facts as admitted by the demurrers, it is apparent that the property in question actually came into the possession of the Receivers in bankruptcy and so of the Court, jurisdiction of this suit cannot be sustained on the first ground stated in the appellant's brief (p. 11).

It cannot be maintained that the property in question did come into possession of the Receivers, except by treating the lease of Dresser & Co.'s store to the Security Warehousing Co., the possession of its custodian, the issue of the warehouse receipts or "Security Instruments" and the transfer of these instruments to the various defendants, as security for loans, as, one and all, void and of no effect.

It is evident from the bill that the appellant has not ventured to rest his case upon this theory alone. In paragraph 29 of the bill (Record, p. 7) he says, "if any or all of the Security Instruments *should* "*for any reason be held to be valid* as against your "orator, it is impossible," &c., &c. In paragraph 31 (Record, p. 7) he says again that he "is further "entitled, *in case any of said transactions be de-* "*creed to be valid*, to relief in equity," &c., &c. Again, in his prayer for relief (Record, p. 8) he asks, first, that the Security Instruments be decreed to be invalid, but, secondly, "*in case any of the security* "*instruments are decreed valid and effective* as "against your orator," then for a discovery and accounting and other relief.

Previous to the commencement of this suit the complainant had brought an action against these same defendants in the Supreme Court of New York

upon a complaint making substantially the same allegations, and asking substantially the same relief as in this suit. The Supreme Court held that in that case the plaintiff had improperly united causes of action for conversion and for an accounting, and made an order which substantially required the plaintiff to elect between them.

Whitney *vs.* Wenman, 96 App. Div. (N. Y.), 290.

The plaintiff, however, not venturing to rest his case upon the claim that the "Security Instruments" were invalid, abandoned the State Court action and resorted to the United States District Court with a bill of complaint, again seeking alternative relief upon alternative views of the legal effect of the transactions.

We submit therefore that, the complainant himself being judge, it is not conceded on the face of this bill that the transactions in question were void or consequently that the Court had possession of the property in question.

It is alleged in the bill that a lease of Dresser & Co.'s store had been made to the Security Warehousing Co.; that a custodian had been appointed by it who was on the premises, that instruments in the form of warehouse receipts had been issued by it for the goods on the premises, that these receipts had been transferred as security for loans, that the Security Warehousing Co. claimed to be in possession of the premises and the property—a claim which was recognized by the assignee and receiver who had every means of knowing the facts and who was acting under the responsibility of a bond.

Doubtless all these acts *may have been* invalid and all of these claims unsound. Doubtless the complainant would have a right to show them to be so, if he could, at the proper time and in a proper way.

But as the learned District Judge says in his opinion (Record, p. 16), these facts, alleged in the bill itself, cannot be simply disregarded and brushed aside as a sham in order to permit the Court to assume as a fact and as the basis of its jurisdiction that a precisely opposite state of facts existed. The only allegations of the bill which can be claimed as furnishing ground for such a course are merely the pleader's inferences and conclusions of law, which are not admitted by the demurrers.

In a case decided in August, 1904, in the U. S. Circuit Court for the Eastern District of Tennessee, *Bush et al. as Trustees in Bankruptcy* vs. *Export Storage Co., Security Warehousing Co., et al.* (the opinion not reported, but a printed copy submitted with this brief) warehouse receipts identical in form with those in question in this case, issued by the same company, under almost exactly the same circumstances, in pursuance of the same course of business and attacked on the same grounds, were sustained by the Court as valid.

We do not refer to this case as an authority on the present question and we are well aware this is not the time or place to argue the validity or invalidity of the "Security Instruments," but upon the question of whether the Court can "disregard and brush aside as sham" the "Security Instruments" in question it is pertinent to show that another Court, upon full hearing, has held precisely similar instruments to be valid.

In neither of the cases cited by the appellant at pages 4 and 20 of his brief (Yenni *v.* McNamee, 45 N. Y., 614, and Button *v.* Rathbone, 126 N. Y., 187), are the facts similar enough to those in the present case to make those cases authority for holding, on these demurrers, that the transactions set out in the bill were utterly void, and that the fact of possession was the direct contrary of what was claimed by the Security Warehousing Co. and admitted by the receivers.

III.

Jurisdiction of this suit is not conferred by Section 70e of the Bankruptcy Act.

Section 70e of the Bankruptcy Act authorizes the trustee to avoid any transfer which any creditor might have avoided, irrespective of the four months' period, and to recover such property or its value, and then provides:

> "For the purpose of such recovery any "court of bankruptcy as hereinbefore defined "and any State court which would have had "jurisdiction if bankruptcy had not inter- "vened shall have concurrent jurisdiction."

Standing alone, this might be held to give jurisdiction of this suit, but it must, of course, be read in connection with Section 23*b*. This section was carefully considered by this Court in Bardes *vs.* Hawarden Bank, 178 U. S., 524, and in that case this Court expressly held as follows:

> "1st. The provisions of the second clause "of Section 23 of the Bankrupt Act of 1898, "control and limit the jurisdiction of all "courts including the several District Courts "of the United States over suits brought by "trustees in bankruptcy to recover or collect "debts due from third parties or to set aside "transfers of property to third parties al- "leged to be fraudulent as against creditors, "including payments in money or property "to preferred creditors.
>
> "2d. The District Courts of the United "States can, by the proposed defendant's con- "sent but not otherwise, entertain jurisdic- "tion over suits brought by trustees in bank- "ruptcy to set aside fraudulent transfers of "money or property made by the bankrupt "to third parties before the institution of the "proceedings in bankruptcy."

These rulings were followed and reaffirmed a year later in Wall *v.* Cox, 181 U. S., 244.

The amendments made by the act of February 5, 1903, made no change in the language of Sec. 23 as it stood when Bardes *vs.* Hawarden Bank was decided, but merely added at the end of subdivision *b* the words

> " except suits for the recovery of property
> " under Sec. 60, Subd. *b*, and Sec. 67, Subd.
> " *e*."

It is not claimed or suggested that this suit is brought under either Sec, 60*b*. or Sec. 67*e*.

The limitation of Sec. 23*b* as construed by Bardes *vs.* Hawarden Bank applies therefore, in full force, to this suit.

The consistency of this limitation with the provision of Sec. 70*e* above quoted is made very plain by the case of

Gregory *v.* Atkinson, 11 Am. B. R., 495.

In that case Adams, *J.*, says (p. 497):

> " Section 70*e*, as amended, clearly enough
> " confers jurisdiction upon this Court over
> " the subject matter of fraudulent convey-
> " ances in violation of State statutes, irre-
> " spective of the time when made. But does
> " it go further and confer jurisdiction over
> " the persons of the defendants without
> " their consent? In very emphatic language,
> " Congress, by Section 23*b*, laid down a gen-
> " eral and comprehensive rule to the effect
> " that suits by the trustee shall only be
> " brought or prosecuted in the courts where
> " the bankrupt might have brought or prose-
> " cuted them, if proceedings in bankruptcy
> " had not been instituted, except by consent
> " of the proposed defendants. To this gen-
> " eral rule two exceptions already referred
> " to are expressly made. If Congress had
> " intended to except from this general rule
> " all actions to set aside fraudulent convey-
> " ances, as contemplated by Section 70*e*, no
> " reason is apparent why it did not, in terms,
> " except such actions from the operation of

"the general rule there laid down. Its attention was called to the subject, and it legislated on that subject. Under such circumstances, it is reasonable to conclude that it expressly mentioned all of the exceptions it intended to make. The amendment of February 5, 1903, conferring jurisdiction upon courts of bankruptcy, in common with State courts, for the recovery contemplated by Section 70*e*, must, in my opinion, be read in connection with Section 23*b*, and, when so read, means that jurisdiction over the subject matter of Section 70*e* is conferred upon this Court, but can be exercised only on the condition imposed by Section 23*b*, of securing the consent of the proposed defendants. This conclusion is re-enforced by the fact that, notwithstanding jurisdiction is conferred upon this Court by Section 23*b* to recover preferential payments and cancel fraudulent conveyances made within four months prior to bankruptcy proceedings without the consent of the proposed defendants, yet Congress, out of abundant precaution, saw fit, in both Sections 60*b* and 67*e*, to expressly provide for jurisdiction over the subject matter in such cases. The same precaution doubtless prompted Congress to confer general jurisdiction in common with State courts over suits contemplated by Section 70*e*, in cases where consent to the personal jurisdiction was made a prerequisite to the exercise of general jurisdiction over the subject."

Congress had this subject before it and deliberately struck out of the amendment of Sec. 23*b* the reference to Sec. 70*e*.

Collier on Bankruptcy (5th Ed.), 266,
36 Cong. Rec. (pt. I.), p. 1036.

These defendants have not, by appearing, given the consent required by Sec. 23*b*.

Consent of the defendant is required under the Bankruptcy Act not only to give jurisdiction of the person of the defendant, but to give the District

Court the right to adjudicate upon the subject matter of the particular case. By Sec. 70*e* the District Courts are given jurisdiction, generally, of the subject matter of plenary suits to set aside transfers, &c.—which, apart from statute, these courts would not have—but they can exercise this jurisdiction only subject to the qualification imposed by Sec. 23*b*, to wit, with the consent of the proposed defendant—which must be a consent to have the particular controversy adjudicated by the District Court.

To this effect are the decisions on the subject.

In re Hemby-Hutchinson Pub. Co., 5 Am. B. R., 569.

Louisville Trust Co. *v.* Comingor, 184 U. S., 18.

In re Michie, 8 Am. B. R., 734.

In the last cited case it is expressly stated that "a general appearance" was filed by the defendant and subsequently a demurrer to the jurisdiction. Judge Lowell's opinion contains a full discussion of the subject and decides that, for want of consent, there was no jurisdiction.

The cases cited by the appellant at page 21 of his brief do not hold, as there stated, that jurisdiction of such a suit as this can be entertained without the consent of the proposed defendant.

Horskins v. *Sanderson*, 132 Fed. Rep., 415, was a case relating to a transfer made within four months before the filing the petition and was brought under Sec. 67*e*. There is not even a dictum as to what would be the jurisdiction of this Court under Sec. 70*e* without consent of the defendant.

In re Leeds Woolen Mills, 129 Fed. Rep., 922, was a case of summary proceedings instituted by petition and order to show cause, and Judge Hammond's remarks at page 926 do not even allude to suits brought under Sec. 70*e* without the defendant's consent.

Pond vs. *National Exchange Bank*, 124 Fed. Rep., 992, was a suit to recover a preference under Sec. 60*b* and has nothing to do with suits under Sec. 70*e*.

In *Lawrence* vs *Lowrie*, 133 Fed. Rep., 995, it is evident from the report that the defendant appeared and litigated the matter in controversy on the merits, which, of course, gave consent, and the question of jurisdiction involved appears to have been not the one arising here but the question whether the suit could be entertained by the District Court in another district than that where the bankruptcy proceedings were pending.

In *Delta Nat. Bank* vs. *Easterbrook*, 133 Fed. Rep., 521, it does not clearly appear that the question here involved arose at any stage of the case, but it does clearly appear that the defendants appeared and defended on the merits and so gave consent to the jurisdiction.

IV.

No ground has been shown for upholding the jurisdiction of the District Court over this case, and the decree of that Court dismissing the bill for want of jurisdiction should be affirmed.

Respectfully submitted,

LOUIS F. DOYLE,
Of Counsel for Appellees Wenman,
Fish and Boldt.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 576. WHITNEY, TR., v. WENMAN ET ALS.

Comment on appellant's reply-brief.

We should not avail ourselves of the Court's permission to comment upon appellant's reply had it not commenced with the erroneous assumption that our brief here argues propositions not discussed below. To correct this misapprehension, we send herewith to the Clerk's office (merely for reference, if any Justice cares to make it, not as part of the permanent record) ten copies of our original brief in the district court. We also filed there a reply enforcing and expanding our propositions and answering those of the plaintiff. A mere glance at the division-headings of our brief below will demonstrate that we relied then upon the same grounds of non-jurisdiction we do now; the differences being merely textual, arising from condensing our two briefs and from the occasion for answering the brief the appellant had filed here.

Our examination of the bill, which the plaintiff's reply calls "attacking the merits," was to ascertain if jurisdiction could be found in its allegations. (194 U. S. 118; our brief, 12: Div. IV.)

We have never confused 'warehouse receipts' with 'chattel-mortgages,' nor considered the former within Sec. 90 of the Lien Law.

In construing the word 'creditors' in the cited section to mean only judgment creditors, the Circuit

Court of Appeals in the Second Circuit was but accepting the construction given by the N. Y. Court of Appeals.

Stephens v. Meriden, 160 N. Y. 168.
Sheldon v. Wickham, 161 *Id.* 500.

There is no charge of fraud in the bill, but a statement that these warehouse receipts came to the defendants for full value paid. To take customary security for a present loan is no fraud.

At that very page (32) of our brief which the reply cites as saying appellant's remedy was by summary proceedings, we say precisely the contrary; that, because the property was never in the custody of the Court, or possession of the trustee, he had to bring an "independent suit." He brought it in the wrong tribunal, upon insufficient allegations.

Our disregard of cases like Minne. v. St. Paul was not that they were railroad cases merely, but because they related to property unquestionably in the custody and under the control of the Court; while here the trustee, never having had possession, is suing to recover the value of property which has been sold, and the proceeds scattered.

An ancillary suit is one 'subordinate' or 'auxiliary' to some principal. (31 App. Div. 389.) An ancillary bill is one arising out of, and dependent upon, other original proceedings.

Coltrane v. Templeton, 45 C. C. A. 328.

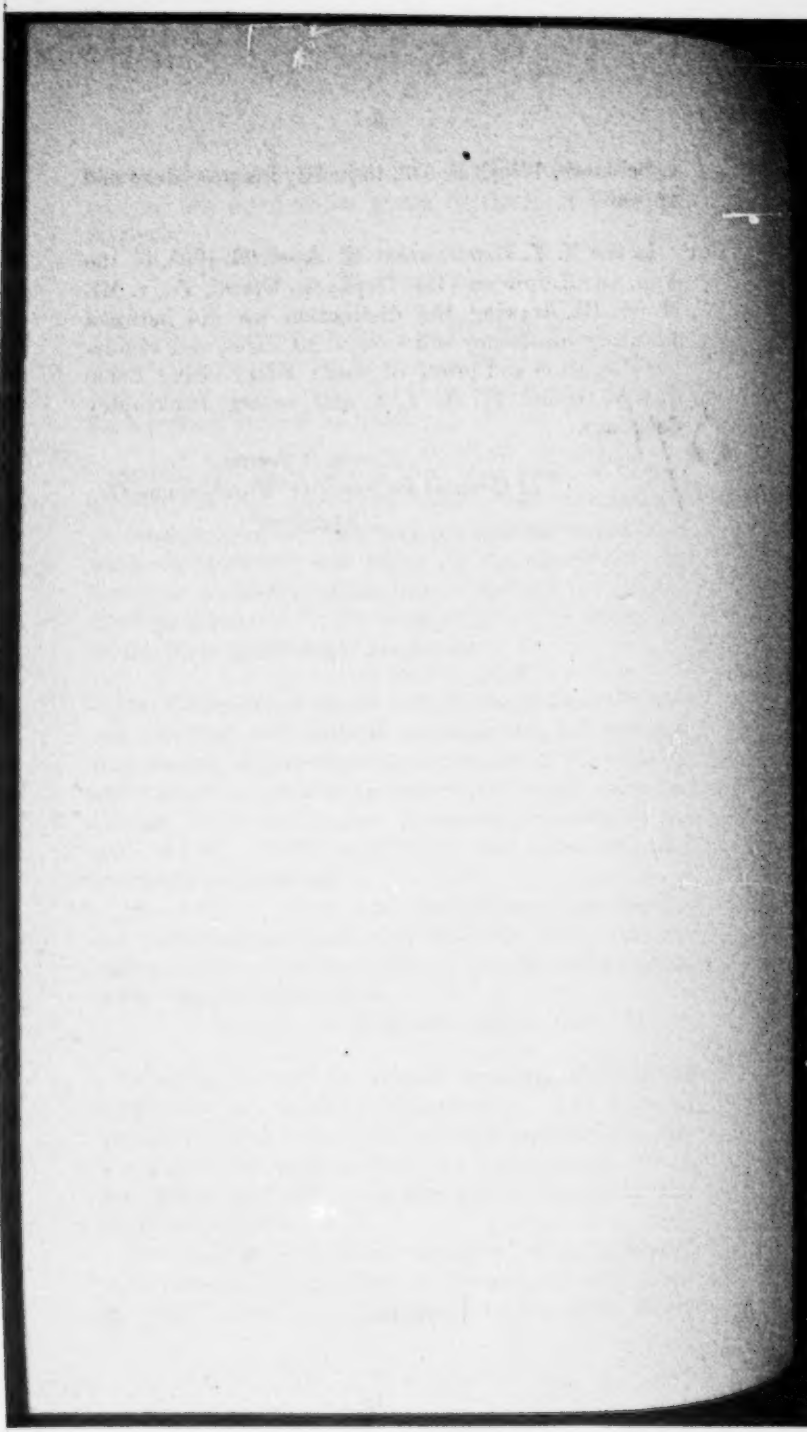
Summary proceedings actually pending might afford a basis for an ancillary bill, possibly. The claimed, but *unexercised*, "right to proceed summarily" certainly does *not* carry with it as a consequence, *per se*, the right to institute a plenary bill in equity in the bankruptcy court.

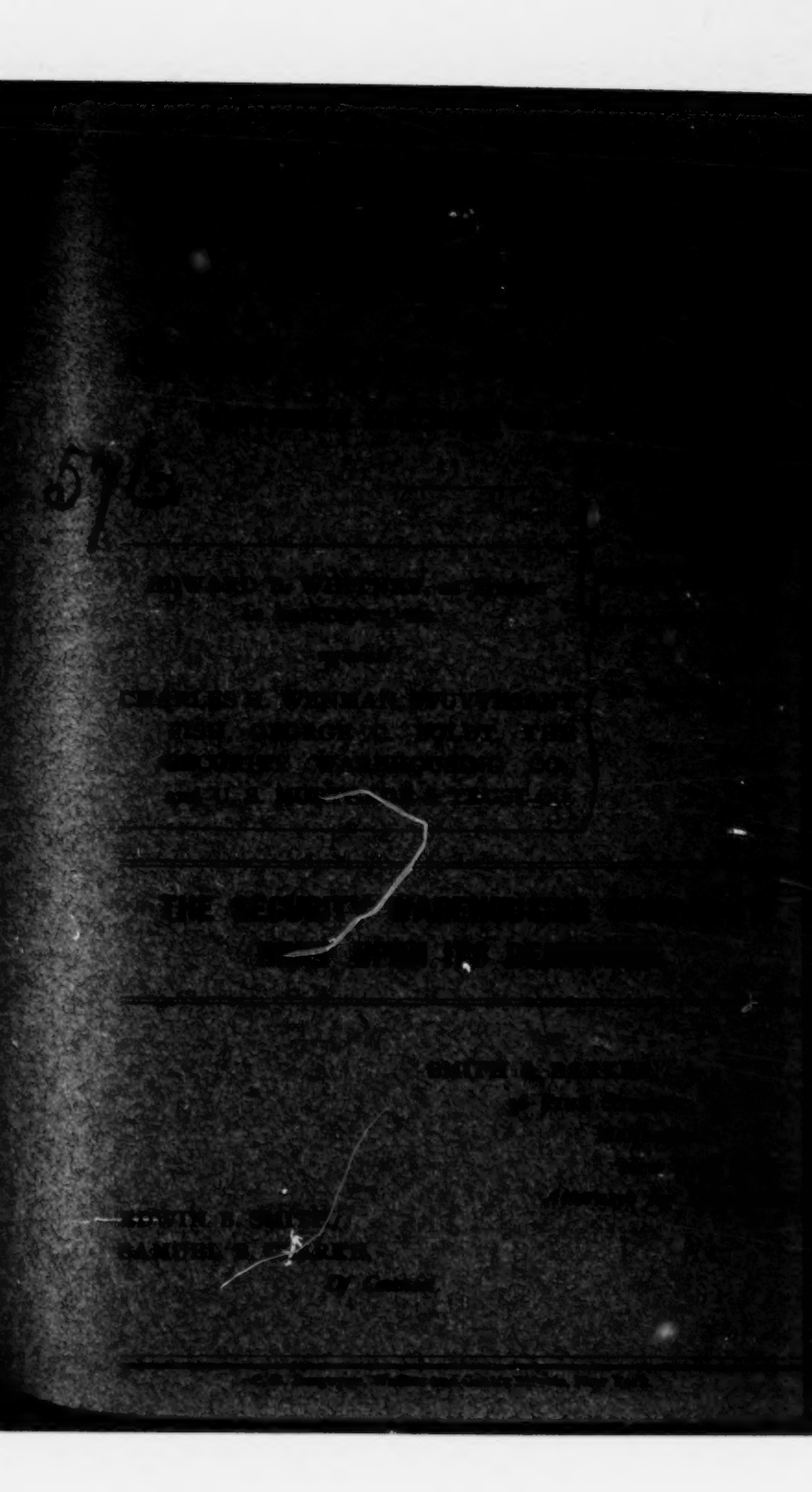
The appellant confounds 'ancillary' with 'plenary,' as he does the proceedings in bankruptcy with a bill in equity. Ending as he began, he relies upon White

v. Schloerb, 178 U. S. 542, to justify his procedure and appeal.

In the N. Y. Law Journal of April 26, 1905, is the App. Divn. opinion (1st Dept.) in Upson, Tr., v. Mt. Morris Bk. drawing the distinction we did between statutory insolvency and *solvere ad diem*, and requiring allegation and proof of *mala fides;* citing Benedict v. Dashel, 177 N. Y. 1, and several bankruptcy decisions.

EDWIN B. SMITH,
of Counsel for Security Warehousing Co.,
Appellee.





United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co.	
AGAINST	In Equity.
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, the SECURITY WAREHOUSING COMPANY, and UNITED STATES MORTGAGE & TRUST COMPANY.	

SECURITY WAREHOUSING COMPANY'S BRIEF ON DEMURRER.

I.

Preliminary.

As to every federal court below the Supreme, "the fair presumption is that a cause is without its jurisdiction till the contrary appears." (4 Dallas, 8 and 12.)

"This renders it necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, to set

forth upon the record of a circuit court the facts and circumstances which give jurisdiction, either expressly, or in such a manner as to render them certain by legal intendment." Turner v. Bank, 4 Dallas, 11.

Dred Scott, 19 Howd. 401; 97 U. S. 649.
Grace v. Am. Co. 109 U. S. 283; 4; and cases passim.
Hubbard v. No. R. R. 3 Blatch. 84.
Ex p. Smith, 94 U. S. 456.

The right being statutory, "before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the Statute." (95 U. S., 185, bottom.) MORROW, C. J., says:—"We are confronted at once with the presumption that the cause is without the jurisdiction, unless the contrary affirmatively appears," citing cases to show that "the court would infer or presume against jurisdiction, but not in its favor."

Fife v. Whittell, 102 Fed. R., 539, 540.
Real Est. Tr. Co. v. Thompson, 112 *Id.*, 946, bot.

It becomes necessary, then, carefully to consider the statutory provisions of the Bankrupt Act of 1898 (as amended February 5, 1903) and to compare with them those statements of facts in the bill of complaint which a demurrer admits, to see if these make out a case so "specially circumstanced" (4 Dall., 11) as to bring it within the jurisdiction of this Court.

II.

Statutory Provisions.

Before taking up any section of the law, let it be premi ed that the inquiry does not relate to an exercise of the authority of the Court over an estate being administered in bankruptcy, but relates to the con-

ditions which allow it jurisdiction over a plenary bill in equity. Sect. 23*a* makes this distinction. *In re* Gray, 47 App. Div., 557; 178 U. S. 532-3.

(1.) Section 23*b* allows the trustee to sue only in that forum in which the bankrupt (had he not been petitioned into bankruptcy) could have sued "unless by consent of the *proposed* defendant," except suits for the recovery of property under section 60 subdivision *b*, and section 67, subdivision *e*.

It does not except suits brought under sec. 70*e*. *Exceptio unius, etc.*

This will be further discussed when we come to consider this last-mentioned section.

(2.) Section 60 *b* relates only to preferences shown within four months of the filing of the petition. Kindt, 101 F. R. 107.

The bill sets forth no preference; nor complains of any act of the bankrupt with either defendant within four months.

Its sixth paragraph says it was "For at least six months prior to the seventh day of March, 1903", that Dresser & Co. were insolvent; and were "only able to continue in business by borrowing large sums of money" upon a pledge of goods, and "to conceal from their unsecured creditors *the fact* that the same were pledged"; to accomplish which they entered into arrangement with the Security Warehousing Company, "for the purpose of pledging these goods with certain of their creditors", etc. (Par. 7.)

The twelfth paragraph indicates the holders of the warehouse receipts ("for brevity" called by the complainant "Security Instruments") as the "certain creditors" to whom goods were pledged by the borrowers, Dresser & Co., for loans made to them to enable them to continue in business.

The bill seems to lay stress upon the omission by Dresser & Co. to notify "other creditors" of these loans and pledges; as if it were the customary thing for merchants borrowing from banks or individuals to

send around to everybody they owe notices of the accommodation obtained!

The fifteenth paragraph intimates that Mr. Dresser's "personal counsel and confidential adviser" ought to have communicated all thus learned to his other client, the Security Warehousing Company.

Conn. Life v. Schaeffer, 94 U. S. 457.

As to subdivision *b* of Section 60, it is enough to say that the bill affirmatively shows the pledge of Dresser & Co's. goods to have been made more than six months before March 9, 1903, for present loans to the amount of the liens, so the estate of Dresser & Co. was not diminished thereby. This did not constitute a preference. It was only in good faith the lenders parted with their moneys.

There is no allegation or statement indicating that either defendant, or any agent acting therein, had "reasonable cause to believe" a preference was intended.

Nor was there any preference: the pledge being made to raise funds of equal value for immediate use to pay existing creditors. As Judge J. B. McPherson says;—"instead of owing John Doe and Richard Roe, he owed the bank". *In re* Davidson, 109 Fed. R. 884.

See also the language of Hazel, J., in Young v. Upson, 115 *Id.* 194.

Nor had any party "reasonable cause to believe" a preference was intended, or even to suspect it—which is a different thing.

Grant v. Nat. Bk. 97 U. S. 81.
Stucky v. Masonic Bk. 108 *Id.* 75.

The burden is upon the trustee to maintain the proposition that the defendants had reasonable cause to believe.

Barbour v. Priest, 103 U. S. 296.
Kaufman v. Tredway, 195 *Id.* 273.
Forbes v. Howe, 102 Mass. 436 bot.
Parsons v. Topliff, 119 *Id.* 248.
Otis v. Hadley, 112 *Id.* 106, Gray, J.
Harmon v. Feldheim, 131 Mich. 470.
Netter v. Refowick, 12 Pa. Dist. 196.

Complainant can only recover *secundum allegata et probata;* hence, he must allege this fact, especially as it is one essential to the jurisdiction of this Court. Nowhere does he allege it.

In paragraph 17 of the bill, it is said all the defendants "knew OR *ought to have known*" certain circumstances affecting the warehouse receipts.

The courts of New York, and the U. S. Circuit Court of Appeals (here sitting) have held, "to state in the alternative is to state neither the one nor the other fact. Such an alternative statement of grounds results in a mutual exclusion." Cronin v. Crooks, 143 N. Y. 354, affirming 76 Hun, 124, and citing numerous decisions.

U. S. v. McCreery, 62 U. S. Ap. 337.
Collins v. Beebe, 27 N. Y. St. 5.
State v. Smith, 61 Me. 386.
Brown v. Keene, 8 Pet. *115.

"It is no answer to an objection to averments made in the alternative to say that, if either averment is true, the plaintiff has alleged a cause of action." Jamison v. King, 50 Cal. 136.

Potter v. Herman, 8 *Id.* 623, FIELD, C. J.

No such contention could be made in the present case. Welsford says the one rule of equity pleading strictly applied is "that the pleading will be construed most strongly against the party pleading." (Welsf. Eq. Pl. 10.) Farren states that the complainant cannot be supposed to have any greater right, or the defendant any more guilt, than the pleadings [thus construed] set forth. (Bill in Ch. 1, 2.) The application of this rule is equally well known, universal and stringent as the rule itself, viz.:—that where the pleading is ambiguous and susceptible of two interpretations, the demurrant may adopt that most favorable to himself and "most against the plaintiff's interest." (Welsf. 126 mid.; Mitf. 128, note 1.)

Vernon v. Vernon, 2 Myl. & Cr. 145.

If the alternative averment did not neutralize itself, we could claim that it simply averred the defendants "*ought* to have known" the indicated matters—which is mere opinion, not fact; a conclusion of law, not admitted by the demurrer; which admits only facts "positively alleged; not every fanciful pretence suggested". Baker v. Booker, 6 Price, 581.

The fair implication from the statement that defendants "ought to have known" is that (although they 'ought') they did *not* know. This law imposes no penalty upon ignorance, unless a creditor has reasonable cause to believe; which implies a knowledge of circumstances naturally inducing belief. Here, the utmost the allegation can be supposed to imply is that defendants 'ought' to (but did not) know the circumstances. The averment of "satisfactory cause" is held not to be equivalent to "reasonable cause". Smith v. Bean, 130 Mass. 298.

According to the ordinary course of business, it is seldom the case that the holder of a warehouse receipt is cognizant of all that is done at the warehouse. If we can venture to offer a suggestion as to the individual defendants, it is not reasonable to suppose that they took these "security instruments" for their loans knowing or believing all those matters to be true which are charged in this bill.

(3) Subdivision *e* of section 67 is also subject to the four months limitation, and preserves the rights of *bona fide* incumbrancers.

Hence this provision affords no support to the present action.

What has been said, *supra*, applies equally to this section, and need not be repeated.

It may be added that this section contemplates only that the trustee may re-possess himself of the *res* itself. The words "or its value", employed in section 70*e*, do not appear in this section.

III.

Section 70e.

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, *unless* he was a *bona fide* holder for value prior the date of the adjudication. Such property may be recovered or its value collected, from whoever may have received it, EXCEPT *a bona fide holder for value.* For the purpose of *such* recovery [*i. e.* from one *not* "a *bona fide* holder for value "] any court of bankruptcy, and any state court which would have had jurisdiction, if bankruptcy had not intervened, shall have concurrent jurisdiction."

In his (4th) edition of Collier on Bankrupty, at page 250, Mr. Hotchkiss—referring to the amendments of February 5, 1903, consequent upon the construction given to the original act of 1898 in Bardes v. Hawarden, 178 U. S., 524—notices that "the Senate judiciary committee struck out the words, which in the Ray bill concluded section 23*b*, but failed to strike out the corresponding clause conferring jurisdiction which the latter bill had added to section 70*e*. *This at once raises a doubt whether any suit to recover property transferred more than four months before bankruptcy can be laid other than in the state court.*" (Collier on Bank'cy., 4th ed., 250.)

In a case involving a transaction taking place more than four months before adjudication, to set aside which the trustee proceeded in the U. S. District Court, under existing section 70*e* (quoted by the court) Judge E. B. ADAMS, D. J., examining the whole act, quoting section 23*b*, came to the conclusion that his court had no authority to take cognizance of the cause "without the consent of the proposed defendant", which had not been obtained; and, for lack of it, he dismissed the case "*for want of jurisdiction*".

Referring to 178 U. S. 524, he says:

"In the light of that opinion Congress amended section 23*b* by adding 'except suits for the recovery of property under section 60*b* and 67*e*'. By this section (23*b*) as amended, in my opinion, Congress intended to, and did, confer jurisdiction without the consent of the proposed defendant *in cases contemplated in the exception*, namely, those for the recovery of preferential payments provided for by section 60*b*, and to set aside fraudulent conveyances provided for by section 67*e*, provided the payments or the conveyances were made within four months prior to the filing of the petition for adjudication. *In all other cases*, I think, *the law was left as it was prior to the amendatory act*".

Gregory v. Atkinson, 127 Fed. R. 183.

No other reasonable purpose can be assigned for striking out the words 'and section 70*e*' from the bill, leaving sections 60*b* and 67*e* as the only exceptions to the requisite consent prescribed by section 23*b* as the general rule for suits by a trustee in a federal court of the parties' residence.

Construing sections 23*b* and 70*e* as giving absolute right to the courts of bankruptcy to entertain suits under sections 60*b* and 67*e*, and only a right conditional upon the proposed defendant's consent to take cognizance of other suits by the trustee, makes all these sections harmonious and the law consistent. No other construction does this.

It is horn-book learning "that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act." (2 Cranch 52.)

Mut. Ins. v. Champlin, 21 Fed. R. 85.

"It is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has

been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together." Peck v. Jenness, 7 How'd. 623.

That case arose under the bankruptcy act of 1841.

Though the views of an individual legislator cannot affect the construction of a statute, the general course of the debate, the report and action of committees, and especially of one branch of the legislature in amending the bill, are proper subjects of consideration.

Ches. & Pot. Co. v. Manning, 186 U. S. 245
citing *Blake v. Nat. Bks.* 23 Wall. 319;
Platt v. Un. Pac. 99 U. S. 64, and
Church v. U. S. 143 *Id.* 464.

One great obstacle to the continued existence of a bankrupt law has been jealousy of the federal courts, in some parts of the country. It was this feeling that led to the original section 23*b*; and it induced the striking out of 70*e* from the proposed amendment of that paragraph.

The matters covered by amended sections 60*b* and 67*e* relate to preferences and conveyances *intended* to defeat the object of the bankrupt act; and, therefore, preferably to be heard in the bankruptcy courts. Section 70*e* affects fraudulent conveyances, running back through the period of the state's statute of limitations, which are a fraud upon creditors, though made without reference to the bankrupt act. These long-past transactions it was considered by the Senate should be left to the state courts, unless the defendant was willing to submit them to the scrutiny of a federal tribunal —and the House acquiesced in this disposition of the matter.

IV.

Consent of the proposed defendant.

Assuming Judge E. B. ADAMS' construction to be correct, we will note that it is not the defendant's consent that is made a condition precedent to jurisdiction, but that of the person whom the trustee proposes to make a defendant.

A 'proposed' defendant is not one *in esse*, but one intended to be made such *in futuro*. The purpose to sue him in a bankruptcy court must be communicated, and assented to by him, *before* service of the summons; for that service makes him, *eo instanti*, a defendant, calling him into court to make *some* defence.

Unless obvious necessity compels, no statutory word should be rejected as insensible or superfluous; but should be taken according to its ordinary meaning. (16 Howd. 261.) This word 'proposed', inserted in the original, and retained in the amended, act cannot have been employed inadvertently. It would have been simpler to have omitted it, if the consent of one already sued had been intended; but such was not the intention. It was not designed that the dockets of the federal courts should be lumbered up with cases in regard to which it was problematical, at the time of their entry, whether jurisdiction could be retained. The intention was to transfer from the plaintiff to the defendant the election of the tribunal in which such litigation should be conducted. It limited the jurisdiction of federal courts to such persons, not otherwise amenable to it, as had consented thereto; Congress having power to impose any limitation seeming to it good.

If, then, this be a jurisdictional fact, it should be alleged in the complaint; and the present one contains no such allegation.

Of course, if a defendant goes on to litigate the merits, he estops himself from making the objection; no man can complain of a judgment, or proceeding, to which he has assented. Thompson v. Perkins, 57

Maine, 290. Exgr., a petitioner for the location of a way, cannot have the proceedings quashed as irregular. *Volenti non*, etc.

V.

Bona Fide Holder.

The trustee can avoid a fraudulent transfer which any creditor could, and recover the property, or its value from the transferree, "*unless he was a bona fide holder for value* prior to the date of the adjudication. Such property may be recovered, or its value collected, from whoever may have received it *except* a *bona fide* holder for value." (Sec. 70*e*.)

"For the purpose of *such* recovery," from one not holding *bona fide*—and for that purpose only—the courts of bankruptcy are given jurisdiction.

This paragraph *e* being intended to define a statutory jurisdiction, every element of this definition must be stated in a complaint asking a hearing in this court, including the bad faith of, or non-payment of value by, the defendant. Every holder in good faith, for value, is immune from attack by the trustee; hence, an averment that the defendant is *not* such holder is an averment vitally necessary to sustain jurisdiction against a demurrer. The trustee can drag into court no one against whom he is unwilling to make this charge.

The presumption against jurisdiction, in addition to the ordinary rules of pleading, require the trustee to make this charge, affirmative in fact, even if negative in form. (Potter's Dwarris, 119; 1 Kent, Com. 463.)

As Mr. Endlich says;—

"The effect of an exception which is part of the enacting clause, and is of general application is to restrict from application to the matters excepted the general language of the section or statute which, without the exception, would have included the same," adding in a note;—"It follows that in an action based

on the statute *the pleadings must negative an exception* contained in the enacting clause, as otherwise *it cannot be seen that the general language of the statute embraces the particular case.*" Endlich on Stats. Sec. 184, p. 253. He explains 'enacting clause' to mean the body of the statute. (15 Pet. *445.)

Wayman v. Southard, 10 Pet. *30.
Savings Bk. v. U. S. 19 Wall. 236.

It must be averred that a defendant is not within the exception of the statute. Whatever is necessary to give a right of action to the plaintiff must be averred.

Walker v. Johnson, 2 McLean, 92.

The following excerpt from Judge McLean's opinion shows the pertinency of his decision to the case at bar.

"The statute does not originate the cause of action; but it protects the defendant from an action unless he be *charged* with fraud, negligence or waste. Now, in this matter of defence to be set up by the defendant, or is it *inseparably connected with the plaintiff's case?* An executor or an administrator can only be made personally responsible by suggesting a devastavit: and this suggestion must always be made in the declaration. Now, in the present case, the defendant is not liable to be sued, unless fraud, negligence or waste be *charged.*"

Walker v. Johnson, 2 McL., 96, 97.
Clough v. Shepherd, 31 N. H., 494,

where that court say the principle, though more often declared in penal actions, is equally applicable to civil cases; citing Vavasour v. Ormod, 6 B. & C. 431 (debt upon a lease) and other authorities.

The Maine Court said: This is a suit in equity. In regard to such suits, the jurisdiction of this Court is limited and specific. Even in Courts of general equity jurisdiction, a bill in equity must state a cause within the appropriate jurisdiction as a Court of equity": and within such Court's limitations, of course, whatever they may be.

Chase v. Palmer, 23 Me. 345; Whitman, C. J.
Ex. p. Smith, 94 U. S., 455. Bigelow, 114.
7 How. 132, 159; 16 Wall. 29, 10 N. Y. 369.

Though, in many particulars, complainant's bill may be defective we do not refer to the omission of any statements except such as are essential to show jurisdiction in this Court.

Where jurisdiction depends upon diverse citizenship, the averments, though affirmative in form, are really only to negative the idea of a common citizenship. Conversely, it is the existence of bad faith that is to be proved by plaintiff. (21 Wall 359) although, in form, alleging the want of good faith. This allegation is as vital as that of citizenship where jurisdiction depends upon that fact.

We will cite authoritative definitions of '*bona fide*' to show that the general allegations of this bill do not charge a want of it, to supply the omission of a direct statement to that effect.

Bona fide. "Good faith. A creditor or purchaser in good faith is one who has loaned money or purchased property fairly, in the usual course of business, for an honest price, and without being cognizant of, or implicated in, any intent which the borrower or seller may have had to evade claims of his creditors, or defraud some person interested in the matter." (1 Abbott's Law Dict. 536.)

Quoted in Anderson's Law Dict. 446.

The burden of proving bad faith is on assailant of taker's title; hence, he must allege it. Hotchkiss v. Nat. Bks. 21 Wall. 359 and citations.

Under those provisions relating to preferences, or fraudulent conveyances, within four months, it has been said repeatedly that the transferree's "cause to believe" the bankrupt's purpose to be to evade the law must be alleged. This is equivalent to '*bona fide*' in section 70*e* except the proof would have to be more stringent under this latter section.

The bill nowhere charges that defendants were not holders for value. On the contrary, it declares the transaction which the trustee attacks, and the warehouse receipts issued under it, were for the purpose of borrowing large sums of money (Pars. 6 and 7); and its

paragraph 12 says these receipts were delivered "to secure certain loans."

Bad faith, or the absence of good faith, is nowhere charged. The statement that defendants took them "to *secure*" present loans certainly leads to the inference of good faith.

The adjectives or epithets used in the bill are not admitted by the demurrer; the court simply ignores them.

Fogg v. Blair, 139 U. S. 127;
Kent v. Lake, 144 *Id.* 91.

Disregarding them, it is shown that Dresser & Co. gave a lease to the Security Warehousing Co.; that a custodian of the goods was designated by this Company; and thereupon it issued these warehouse receipts, contemporaneously with the storage of the goods. Subsequent neglect or inattention on the part of the Warehousing Co., or its custodian, could not invalidate these instruments, taken in good faith and for value at their inception, or afterwards. Suppose the methods adopted were ultimately found to be injudicious and insufficient for protection of the goods; that does not make them void *ab initio*.

That the Warehousing Co. let Dresser & Co. have money on these receipts is evidence that, even if careless, it acted in good faith, and without knowledge that any removal of goods by Dresser & Co. was permitted by its custodian.

There is no claim that any other defendant had knowledge or notice of any one of the recited circumstances, even if they occurred as stated. Indeed, it is not alleged that the Security Warehousing Co. had any such knowledge or notice. There is only the general, insufficient, allegation that "the defendants knew or ought to have known" the matters mentioned—which has already been discussed. (*Ante*, p. 5.)

The Supreme Court, per FIELD, J., said;

"A suspicion that there is a defect in title in the holder or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or

even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, *which implies guilty knowledge* or wilful ignorance, and the burden of proof lies on the assailant of the title." Hotchkiss v. Nat. Bks. 21 Wall. 359.

Murray v. Lardner, 2 *Id.* 110.
Goodman v. Simonds, 20 How. 363.
Jacobs v. Morrison, 136 N. Y. 104, 105.

Warehouse receipts have been so generally issued and transferred in recent years that they have become entitled to the privileges of negotiable paper; but this is immaterial, as section 70*e* gives every honest transferee the same protection.

New York State law does the same; as will be seen by reference to the "Personal Property Act", which the complaint supposes to have avoided our liens.

"SECTION 29. This article does not affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appear that such purchaser or incumbrancer had *previous* notice of the fraudulent intent of his *immediate* vendor, or of the fraud rendering void the title of *such* vendor."

So no creditor in this state could have shown a cause of action without averring *mala fides* of this character.

VI.

Only bankrupt's transfers affected.

Inasmuch as section 70*e* is confined to setting aside transfers *by the bankrupt*, if these warehouse receipts were taken in good faith the recitals of what the receivers, or the Warehousing Co., or any defendant did after the goods had passed from the possession of Dresser & Co. are all immaterial to this case.

Bryan v. Bernheimer, 181 U. S. 194.

The demurrer should be sustained, and the bill dismissed.

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Of counsel.